APPENDIX A.

JAMES J. MARETT, as Receiver of the Property of PHILIP C. P. TOALE, *Plaintiff*, v. FRANK SHANNON, *Defendant*.

164 Misc. 790.

HUMPHREY, J. This action is brought by a receiver in supplementary proceedings to recover for losses alleged to have been suffered by Philip C. P. Toale to the defendant Shannon for lost wagers. The action was tried without a jury and commenced on September 29, 1936.

A review of the facts antedating the commencement of the action is essential to an understanding of the issues involved. Philip Toale was in the employ of one Max Hirsch, whose business, among other things, was connected with the race tracks operated throughout the State. Philip Toale forged the name of his employer to certain of the employer's checks, which came into the hands of the employee. Contrary to Toale's duty, he deposited these forged checks to his account in the National City Bank.

Subsequently, the National City Bank was compelled to pay Max Hirsch, the employer, the amount of these forgeries.

Toale pleaded guilty to the theft and was sentenced to Sing Sing Prison therefor.

The bank assigned its claim against Toale to one Charles F. Goodspeed, who commenced suit for the amount of the forgeries the bank had been required to pay. Goodspeed, in his action, examined Toale in pro-

ceedings supplementary to execution, and on his motion a receiver was appointed of the property of Toale.

The receiver alleges that Toale lost the moneys in wagers to the defendant Shannon. These transactions happened in 1930. At that time the defendant Shannon was known as a "club house commissioner."

The evidence at the trial would indicate that at that time the system of taking bets was more complicated than it had been at other times, and that only those venturers who had credit with the club house commissioners were permitted to indulge in this sport of kings. Employees of the betting commissioner kept a record of wagers laid and at the close of the day a balance was struck and a check drawn either in favor of the bettor or the club house commissioner.

From the account of the judgment debtor with the National City Bank, into which the forged checks belonging to Max Hirsch had been deposited, the judgment debtor drew checks to the order of the defendant aggregating the sum of $16,560.

It seems plain to me, after hearing all of the testimony adduced at the trial, that these checks represented losses by the judgment debtor to this club house commissioner on the daily balances of wager transactions between the judgment debtor and the defendant.

Section 994 of the Penal Law provides that where money is lost through a wager the amount thereof may be recovered from the winner.

Section 991 of the Penal Law provides: "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot,

chance, casualty, or unknown or contingent event whatever, shall be unlawful."

It has been held that an obligation of that character is assignable. (*Meech* v. *Stoner,* 19 N. Y. 26.) The case of *Watts* v. *Malatesta* (262 N. Y. 80), holds that the whole amount of losses may be recovered without any right on the part of the betting commissioner to offset gains by the bettor. In this case only the balances are sought.

The defendant's contention that these checks represented sums advanced to the judgment debtor in cash fails to make a strong appeal.

Plaintiff, as receiver, may have judgment against the defendant for the sum of $16,560, with interest on the face amount of each check from the date thereof.

APPENDIX B.

CHESTER F. CHAPIN v. JAMES M. AUSTIN.
165 Misc. 414.

HOOLEY, J. The first defense is that the paper sued upon was intended to be a receipt and that it was not intended that defendant be personally liable thereon. The second defense is that the note was made as a part of an illegal transaction, i. e., the financing of a bookmaking business. The court finds that the transaction between the parties was as testified to by the plaintiff and not as testified to by the defendant and his witnesses. There was no partnership between plaintiff and defendant. Defendant borrowed the money and gave his promissory note therefor. The first defense, therefore, fails. The only question remaining is whether a plaintiff who has knowledge that defendant intends to finance a bookmaker may recover money loaned for that purpose. Every consideration of fair dealing demands that this plaintiff should recover upon the note in question. The real wrongdoer was the defendant. He is the one who entered into the bookmaking business. He used his illegal transaction to protect him when called upon to pay the money he borrowed. The court would not aid him in this attempt were it not for the provisions of section 993 of the Penal Law. This section provides in part as follows:

"§ 993. Securities for money lost at gaming void. All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, *or where the same shall*

be made for the repaying any money knowingly lent or advanced for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who, during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinbefore declared." (Italics mine.)

The Constitution of the State of New York prohibits gambling (Art. 1, § 9). The fact that the Legislature has seen fit in the case of the making, registering or recording bets or wagers (better known as bookmaking) at the racetrack, to make the only penalty therefor the forfeiture of the money wagered, to be recovered in a civil action (Penal Law, § 986; Uncons. Laws, § 1141), does not make such bookmaking legal. If section 1141 were construed to make bookmaking at the racetrack legal, it would be unconstitutional. Hence, bookmaking at the racetrack is gaming or gambling, and is illegal. Clearly, then, the loaning of the money herein to defendant with the knowledge that it was to be used to finance a bookmaker was the loaning of money with the knowledge that it was to be used for gaming or gambling, and the transaction is within the purview of section 993 of the Penal Law aforesaid. Likewise, pursuant to that section, the note is void.

The plaintiff relies to some extent upon sections 525 and 602 of the Restatement of the Law of Contracts. The difficulty with this contention is that under the New York Annotations to the aforesaid Law of Contracts it states, pertaining to section 525, as follows: "*No decision involving the qualification in the*

last clause of subsection (1) (the pertinent part herein) has been found. The language of Penal Law, section 993, is very broad, and may not admit of this qualification."

The difficulty with section 602 is that it expressly contemplates that a statute may prohibit recovery because it recites "or unless a statute prohibits recovery." Section 993 of the Penal Law is the statute that prohibits recovery in this case.

The claim of the plaintiff that delivery of the note was complete at the time of the loan transaction and that, therefore, parol testimony may not be introduced to vary, contradict or modify the terms thereof, would be good were it not for the illegality herein involved. The cases cited by plaintiff are sound law but in none of those cases is there any question of illegal consideration. The parol evidence is admissible either to establish or disprove the validity of an agreement which is attacked on the ground of illegality of subject-matter or consideration. (See Richardson on Evidence [4th ed.], §§ 426 and 429, and cases cited.)

It follows from the foregoing that the testimony with respect to the entire transaction was admissible. It follows further that the note herein was a security within the contemplation of section 993 of the Penal Law, and that the same was void and that there can be no recovery thereon.

The defendant's motion for judgment dismissing the complaint is granted. All other motions denied. Thirty days' stay and sixty days to make a case.